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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73 580

NICHOLAS R. RICHARDS and AGNES B. RICHARDS,
Husband and Wife,
Petitioners,

vs.

CROWN POINT COMMUNITY SCHOOL CORPORATION, HAROLD L. WHEELER, WILLIAM R. BARNETT, GLENN R. COOPER, GLENN O. BOTHWELL, and CHARLES I. AYLESWORTH,
Members of and Constituting the Board of School Trustees of the Crown Point Community School Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA AND TO THE SUPREME COURT OF INDIANA

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Clarification and Comment On Parties and Courts

Parties:

Agnes B. Richards, one of the petitioners named in the caption, died pendente lite. No estate or administration was opened nor any probate proceeding commenced, nor is any contemplated. The land title which is the subject of this Petition, was held by the petitioners, as husband and wife, as tenants by the entireties, under the law of the State of Indiana. As such, the deceased petitioner's interest in such land and title vested, upon her death, solely in the remaining joint tenant, her husband and co-petitioner, Nicholas R. Richards. Said decedent's name is retained in the caption for purposes of aiding in identifying the case in the Court of Appeals and Supreme Court of Indiana.

There has been a change in the individual composition of the Respondent Board of School Trustees recited in the caption and on the cover page hereof. Certain of the named individuals no longer serve on the Board and have been replaced by others. The named individual members appearing in the caption are those serving at the time the action was commenced in the trial court. Those names were retained during the appeal process for the sake of continuity. They are retained here for the same reason, and for the further purpose of permitting ready identification of the cases in the Court of Appeals and Supreme Court of Indiana.

Courts:

It is requested that the United States Supreme Court issue its Writ of Certiorari to <u>each and both</u> the Court of Appeals of

Indiana, and the Supreme Court of Indiana. The reason for this is as follows: At the inception of this action, the Indiana Supreme Court was provided for by the Constitution of Indiana, Article 7, Section 1 of which reads as follows:

> "The judicial power of the State should be vested in a Supreme Court, in Circuit Courts and such other courts as the General Assembly may establish."

The Court of Appeals of Indiana (formerly known as the Appellate Court of Indiana) was established by, and hence a creature of, the Indiana General Assembly. (Indiana Acts 1891, Chapter 37, Sec. 1, p. 39.)

This section (Indiana Acts 1891, Ch. 37, Sec. 1, p. 39) concerning the establishment of the Appellate Court, was re-enacted in the Indiana Code of 1971, as I.C. 33-3-1-1, effective January 20, 1971. Then the entire section was repealed by Indiana Acts 1971, Public Law 427, Section 8, effective January 1, 1972.

The present "law" is set out in pertinent sections of amended Article 7 of the Constitution of Indiana, which reads as follows:

> "Sec. 1. Judicial Power. The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish."

> "Sec. 4. Jurisdiction of Supreme Court. The Supreme Court shall

have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than ten years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed."

"Sec. 5. Court of Appeals. The Court of Appeals shall consist of as many geographic districts and sit at such locations as the General Assembly shall determine to be necessary. Each geographic district of the Court shall consist of three judges. The judges of each geographic district shall appoint such personnel as the General Assembly may provide by law."

"Sec. 6. Jurisdiction of Court of Appeals. The Court shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies. In all other cases, it

shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases."

Thus, the Court of Appeals had original appellate jurisdiction of this cause, and heard the case, and decided it with a written decision and opinion on December 20, 1972. (Appendix A, pp. ___) However, the Supreme Court of Indiana is the Court of last resort in the State of Indiana. The Rules of Appellate Procedure established by the Supreme Court, pursuant to their inherent and express power, specifically provide:

"In The
Supreme Court of Indiana

In The Matter Of The
Adoption Of
Rules of The Court

WHEREAS, this Court has inherent power to make rules of procedure and also has such power pursuant to the authority granted by the General Assembly of Indiana by Acts of 1937, Ch. 91, Section 1, p. 459,

* * * *

AND WHEREAS, during the period of study by the Court, the Indiana General Assembly enacted House Enrolled Act 1733 adopting the same new Proposed Rules with modification, said Act to become effective on and after January 1, 1970, which Act

contained the following section recognizing the inherent power of this Court to amend the procedural rules contained in the enactment:

> 'Sec. 2. The General Assembly of the State of Indiana affirms the inherent power of the Supreme Court of Indiana to adopt, amend and rescind rules of Court affecting matters of procedure, and the General Assembly reaffirms the power given to the Supreme Court to adopt, amend and rescind rules of Court, including these rules of Court herein adopted, as set forth by the Acts of the General Assembly of 1937 at Chapter 91, Section 1.'

AND WHEREAS, this Court has made additional modifications of the procedural rules contained in the said enactment, NOW THEREFORE,

IT IS ORDERED AND DECREED THAT

1. The compilation of procedural rules, appended to this Order, are hereby adopted as the Rules of Procedure of the Indiana Supreme Court, such rules to become effective immediately following midnight of the 31st day of December, 1969; and

2. The current rules of the Supreme Court of Indiana shall remain in effect until midnight on the 31st day of December, 1969, when they shall be abrogated and superceded by the appended rules; and

3. Section 3 of the enactment

of the 1969 General Assembly of Indiana, entitled House Enrolled Act No. 1733, is set out herein in full and appended to this Order for use in determining which statutes have been specifically repealed by said enactment, which section this Court does not intend to affect in any manner by this Order; and

4. The rules appended to this Order shall supercede all procedural statutes in conflict therewith.

It is so ordered this 29 day of July, 1969.

Roger O. DeBruler
Chief Justice."

"APPELLATE RULE 1

Scope of the Rules

These rules shall govern the practice and procedure in appeals to the Supreme Court and the Court of Appeals. Wherever in any rules of this Court the 'Appellate Court' is referred to there shall be substituted therefor the words 'Court of Appeals' and such rules shall be applicable to the Court of Appeals on and after January 1, 1972."

"APPELLATE RULE 11

Rehearings and Transfer

(A) Rehearings. Application for a rehearing of any cause may be made by petition, separate from the brief, signed by counsel, and filed

with the Clerk within twenty (20) days from rendition of the decision, stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs, but such briefs will not be received after the time allowed for filing the petition. Parties opposing the rehearing may file briefs within ten (10) days after the filing of the petition. No extension of time shall be granted for the filing of a petition for rehearing or any brief in connection therewith.

(B) Transfers. In every case where a petition for rehearing has been filed in the Court of Appeals and denied the party against whom the decision is rendered shall have a right to petition the Supreme Court within twenty (20) days from the day of the ruling on the petition for rehearing the transfer said cause to the Supreme Court for review, provided, however, that the petition to transfer shall be limited to only those grounds set forth in the petition for rehearing in the Court of Appeals. The following subsections of this rule shall govern all petitions to transfer a cause to the Supreme Court:

(1) The petition to transfer shall set forth briefly:

(a) that the Court of Appeals decided the case with a written opinion giving the date when the opinion was filed;

(b) that the decision of the Court of Appeals was against

the party seeking transfer;

(c) that a petition for rehearing was filed with the Court of Appeals in time and that a rehearing was denied giving the date of such denial;

(d) that the decision of the Court of Appeals is in error in that . . . (specify with particularity wherein the Court of Appeals committed error and the circumstances giving rise to such error.)

(2) Errors upon which a petition to transfer shall be based may include:

(a) that the decision of the Court of Appeals contravenes a ruling precedent of the Supreme Court, indicating the ruling precedent, or

(b) that the decision of the Court of Appeals erroneously decides a new question of law, concisely stating the same, or

(c) that there is a conflict in the decision with another decision of another district of the Court of Appeals stating concisely the conflict and decision in which it occurs, or

(d) that the decision of the Court of Appeals correctly followed ruling precedent of the Supreme Court, but that such ruling precedent is erroneous or is in need of clarification or modification, or

(e) that the decision of the Court of Appeals fails to give a statement in writing of each substantial question arising on the record and argued by the parties.

If this error is relied upon, the petition shall set forth such portions of the record so as to affirmatively disclose such failure, and establish that petitioner was prejudiced thereby.

(3) The decision of the Court of Appeals shall be final except where a petition to transfer has been granted by the Supreme Court. If transfer be granted, the judgment and decision of the Court of Appeals shall thereupon be vacated and held for naught, and the Supreme Court shall have jurisdiction of the appeal as if originally filed therein, and all the records, briefs and files of said cause on appeal shall be transferred to the Supreme Court.

(4) The denial of a petition to transfer shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court.

(5) In all cases where the Supreme Court is evenly divided, either upon the question of accepting or denying transfer, or upon the proper disposition of the cause once transfer is granted, transfer shall be deemed denied and the decision of the Court of Appeals shall be affirmed and becomes the law of the case.

(6) Briefs may be filed with and in support of a petition to transfer, but they shall not be necessary to invoke the jurisdiction of the court. Parties opposing the

transfer may file briefs within ten (10) days after the filing of the petition or briefs of petitioner, whichever is later.

(7) Upon the filing of a petition to transfer or an appeal to the Supreme Court or Court of Appeals, the petitioner or appellant shall pay a filing fee of one hundred ($100.) dollars to be collected by the clerk of this court for the state of Indiana in addition to any other filing fees to be paid to said clerk. The payment of a filing fee shall not be applicable in a case where it is prosecuted as a pauper cause, or on behalf of a state or government unit.

(8) No petition for rehearing will be permitted filed upon the denial or granting of a petition to transfer. No extension shall be granted for the filing of the petition to transfer or accompanying briefs."

In addition, the Supreme Court has repeatedly held that it can, on motion or of its own volition, review any decision of the Court of Appeals whether it falls within the specified grounds for "transfer" or not. Troue v. Marker (1969) 253 Ind. 284, 252 N.E. 2d 800; Warren v. Ind. Tele. Co. (1939) 217 Ind. 93, 26 N.E. 2d 399.

The Supreme Court has exercised this power to its fullest extent by changing the law of Indiana, by mere opinion, even though denying rehearing of a petition to transfer, which was also denied. Central

Indiana Railway Co. v. Anderson Banking Co. (1969) 252 Ind. 270, 247 N. E. 2d 208.

Thus, while the specific decision and opinion complained of is that of the Court of Appeals of Indiana, rendered December 20, 1972, it is, nevertheless, necessary that the denial of rehearing by the Court of Appeals be brought to this Court's attention, (Appendix B., p. 39) as well as the subsequent denial of transfer by the Indiana Supreme Court on July 3, 1973. (Appendix C., p. 40)

It is this denial of transfer by the Indiana Supreme Court on July 3, 1973, which terminated the case finally in the highest Court of the State, as the Court of last resort in Indiana.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

Nicholas R. Richards
and
Agnes B. Richards,
Husband and Wife,

Petitioners,

v.

Crown Point Community School Corporation, Harold L. Wheeler, William R. Barnett, Glenn R. Cooper, Glenn O. Bothwell, and Charles I. Aylesworth, Members of and Constituting The Board of School Trustees of The Crown Point Community School Corporation,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA AND TO THE SUPREME COURT OF INDIANA

The petitioners, Nicholas. R. Richards and Agnes B. Richards*, pray that a Writ of Writs of Certiorari issue to review: the decision and opinion of the Court of Appeals of Indiana rendered in these

*Now deceased

proceedings on December 20, 1972; and the decision and order of the Indiana Supreme Court denying transfer, without opinion, entered on July 3, 1973.

OPINIONS BELOW

The decision and opinion of the Court of Appeals of Indiana is reported at 290 N. E. 2d 449, ___ Ind. App. ___, and appears at Appendix A., pp. ___ to ____.

The order of said Court of Appeals denying rehearing appears at Appendix B., p. _____. The order of the Supreme Court of Indiana denying Transfer appears at Appendix C, p. ____.

The Findings of Fact, Conclusions of Law, Judgment and Decree of the Lake Superior Court, No. One, from which Respondents (as defendants and appellants) appealed, appear at Appendix D., pp. ___ to _____.

JURISDICTION

The decision and opinion of the Court of Appeals of Indiana was entered on December 20, 1972, (See Appendix A, pp. ____ to _____, infra). The said Courts order denying rehearing was entered February 7, 1973. (See Appendix B, p. ___, infra). The Indiana Supreme Court's order denying Transfer was entered July 3, 1973. (See Appendix C, p. ____, infra.)

This petition for certiorari was filed less than ninety (90) days from the date of denial of Transfer, aforesaid.

The jurisdiction of this Court is invoked under that portion of 28 U.S.C. Section 1257, which provides:

"Final judgments or decrees rendered by the highest court of a state in which decision could be had, may be reviewed by the Supreme Court as follows:

(1) * * *

(2) * * *

(3) By writ of certiorari, ... where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . . . , or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . . . ".

QUESTIONS PRESENTED

Petitioners, as plaintiffs in the trial court, brought suit against respondents, as defendants, to: (a) Declare petitioners to be the owners of fee simple absolute title to a four (4) acre parcel of unimproved real estate; (b) To quiet petitioners' title to said real estate as against the claims of respondents; (c) to vacate, cancel and set aside a commissioners deed to said real estate purporting to convey title to respondents; (d) To order respondents to deliver up to petitioners immediate possession of said real estate; and (e) To permanently enjoin respondents from selling, transferring or conveying any interest in the real estate, or purporting, or attempting, or agreeing to do so.

The subject parcel of real estate and fee simple absolute title thereto was acquired by petitioners by purchase, and owned by them as tenants by the entireties prior to March 6, 1953. On that day, respondents

predecessors appropriated said real estate by condemnation under the Indiana "Eminent Domain for Schoolhouses Act" of 1907, in an action in the Lake County Circuit Court. The respondents, and their predecessors, continued to hold the quality of title appropriated for a period of sixteen (16) years without making any improvements for schoolhouse or other school purposes. Respondents then advertised the vacant real estate for sale at public auction. Prior to sale, petitioners instituted the series of actions culminating in the decision, opinion, and orders complained of. The petitioners prevailed in the second trial court action. Respondents appealed. The Court of appeals of Indiana reversed, and then denied petitioners rehearing. The Indiana Supreme Court denied Transfer.

The questions thus arising and presented are:

1. Whether the decision and opinion of the Court of Appeals of Indiana, reversing the trial court's judgment and decree, and holding, thereby, that respondent School Corporation acquired petitioners' fee simple absolute title, salable to private third parties, is consistent with the Due Process Clause of the Fourteenth Amendment;

2. Whether the State Courts can, by judicial fiat, grant to a public body, a greater quality title than that which the State's General Assembly allows the public body to appropriate under the grant of the power of eminent domain; and

3. Where a school corporation, as a public body, appropriates or condemns, from private parties, a parcel of real estate for schoolhouse purposes, under a State statute

which confers the power of eminent domain for school purposes only, and the land is never donated to or used for school purposes for a period of sixteen (16) years, and the public body then attempts to sell the land at auction to private third parties, does the land revert to the owners from whom it was appropriated, or did the public body acquire more than an easement, or conditional or determinable fee, which could be sold as a fee simple absolute title by the public body, at will?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, Sec. 1:

> " * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; * * *."

Constitution of the State of Indiana, Article 1, Section 21:

> "* * * No man's property shall be taken by law, without

just compensation; nor, except in case of the State, without compensation first assessed and tendered."

Indiana Eminent Domain For Schoolhouses Act of 1907 (Indiana Acts, 1907, Ch. 87, Sections 1 - 4, p. 114):

"Eminent Domain - Purchase of site - Petition for appraisal. Whenever, in the opinion of the trustees of school corporations of any city or town, or of the township trustee of any township in the state, it shall be considered necessary to purchase any real estate on which to build a schoolhouse, or for any other purpose connected therewith, such township trustee or school trustees, or a majority of them, may file a petition in the circuit court of said county, asking for the appointment of appraisers to appraise and assess the value of said real estate."

"Eminent Domain - Appointment of appraisers. - Upon said petition being filed, the owner or owners of said real estate, having had ten (10) days' notice of the pendency thereof, the court shall appoint three (3) freeholders, resident in said school corporation or said township where said real estate is situate, to appraise and assess the value thereof."

"Eminent Domain - Appraisal - Payment - Conveyance of title -

Objection to amount - Trial - Appeal - Final appraisement. Said appraisers, before making said appraisement and assessment, shall take an oath before the clerk of said court to make a fair, true and honest appraisement of said real estate and shall then proceed to examine said real estate, hear such evidence as they may consider necessary and make report of their appraisement to said court within five (5) days after their appointment; and thereupon such township trustee or school trustees of such school corporation, or a majority of them, may pay to the clerk of said court, for the use of the owner or owners thereof, the amount thus assessed, and, upon such payment being made and the same having been shown to the court hearing said cause, the title to said real estate shall at once vest in such school corporation or school township for said purposes, and said court shall cause said real estate to be conveyed to said school corporation or school township by a commissioner appointed therefor, and said school corporation or school township may immediately take possession of said real estate for said purpose. Upon the report of said appraisers being filed, any party to the action, within ten (10) days, may except to the amount of the appraisement and valuation of said real estate, and a trial may be had thereon before said

court as other civil causes are tried, and said court shall fix the amount of said appraisement and assessment, and any party to said action may appeal from the judgment of said court as other civil cases are appealed: Provided, That should said township trustee or school trustees, or a majority of them, except to the amount of the appraisement and assessment as aforesaid, the court shall convey said real estate to said school corporation or school township, and the title to said real estate shall at once vest in said school corporation or school township for said purposes, and the subsequent proceedings upon said exceptions shall only affect the amount of such appraisement and assessments."

"Eminent Domain - Tender before petition - Costs. - Before the filing of said petition, said township trustee or school trustees, or a majority of them, may offer or tender to the owner or owners of said real estate an amount deemed a reasonable value therefor, and should the amount fixed by the appraisers or by the court subsequently thereto be the same or less than the amount so tendered, then said cause shall be prosecuted at the cost of the owner or owners of said real estate, and upon exception to the amount fixed by the appraisers, should said exceptor not increase the amount of said

appraisement and assessment, the action on such exception shall be at the cost of such exceptor. Where no amount has been tendered by said township trustee or school trusteees, or a majority of them, and no exception taken, the action shall be prosecuted at the costs of the petitioners."

STATEMENT OF FACTS

The trial court made and entered its special findings of fact. The respondents (defendants-appellants) did not challenge these factual findings on appeal. Nor did the Court of Appeals or Supreme Court of Indiana vacate any of the special findings of fact. Therefore, it is respectfully submitted that such findings must be taken as the "facts" in this case. They are set out in Appendix D, infra, and repeated here, for convenience sake, as follows:

"(1) On and before March 6, 1953, plaintiffs were owners of fee simple absolute title to the real estate described in Rhetorical Paragraph 1 of plaintiffs' complaint, to-wit:

Part of the East Half of the Southwest quarter of Section 5, Township 34 North, Range 8 West of the 2nd P.M., described as commencing at a point 890.7 feet West of the Northeast corner of a track of land conveyed to Patrick Maguire by Warranty Deed dated March 8, 1871 and recorded March 9, 1871, in Deed Record 13, page 503, running thence South

499.71 feet along the West line of the Maguire track and along the West line of the tract conveyed to Hazel Wilds by Warranty Deed dated May 26, 1939, and recorded May 26, 1939, in Deed Record 595, page 339, to the Northwest corner of the tract of land conveyed to John Kinney by Warranty Deed dated February 20, 1873 and recorded September 11, 1879, in Deed Record 27, page 350, thence West 400 feet, thence North 502.15 feet, to the North line of said East half of the Southwest quarter, thence East along said North line 400 feet to the place of beginning, containing 4.60 acres, more or less, in the City of Crown Point, Lake County, Indiana.

(2) That defendants constitute the Crown Point Community School Corporation, which is a community school corporation organized and existing under the laws of the State of Indiana and charged with the ownership, management and control of the common public schools, lands, property and education system in the city of Crown Point, Indiana. Said defendant is the successor in interest to the School City of Crown Point which was in existence in March of 1953.

(3) That on or about March 5, 1953, the defendant's predecessor commenced an action in the Lake Circuit Court as Cause No. C53-187, entitled: 'In The Matter Of The

Board of School Trustees Of The City of Crown Point for Appointment of Appraisers to Appraise Land Owned By Nicholas R. Richards and Agnes B. Richards, Husband and Wife.' That said petition alleged, in substance, that the Board of School Trustees had found it urgently necessary to acquire the aforedescribed plaintiffs' lands for building accommodations for the School City of Crown Point in order that ample room could be had to house education classes for lower grades and accommodate pupils in the immediate future.

(4) Soon after the commencement of said action in the Lake Circuit Court, appraisers were appointed and the Court found for the petitioners. The appraisers filed their report of appraisal in the sum of $8,000.00, which money was deposited with the Clerk and an appointed commissioner conveyed the land to the school city of Crown Point by Commissioner's Deed, all of which occurred by September 11, 1953.

(5) That said proceedings in the Lake Circuit Court were taken and had pursuant to the 'Eminent Domain For School House Act' of 1907, (Burns' Section 28-2501 and 2504)* as opposed to the 'Eminent Domain

---

*This Act was recodified as Burns' Ind. Stat. Anno. Sections 28-4004 to 4008

Act of 1905' (Burns' Section 3-1707 to 1712).

(6) That for a period of 16 years, from 1953 to 1969, the subject land remained vacant and was not devoted to school purposes for which it was acquired, for the building of accommodations for the school city of Crown Point in order that ample room be had to house education classes for lower grades and accommodate pupils.

(7) That sometime in the Spring of 1969, the defendant determined to sell the subject lands, at public sale, and cause a notice of such purported sale to be published in the 'Lake County Star', on May 2, 1969.

(8) That prior to the receipt of bids in response to said notice, plaintiffs filed written notice with the defendant board, asserting their claim and caused to be instituted an action in the Lake Superior Court, Room No. One, Cause No. 169-603, entitled: Nicholas R. Richards and Agnes B. Richards, Husband and Wife, plaintiffs -vs- Crown Point Community School Corporation, et al, defendants, wherein they asserted their aforementioned claims and contentions.

(9) The cause was subsequently venued to the Benton Circuit Court, docketed there as Cause No. C69-192. Thereafter, defendants filed a motion for summary judgment.

On April 13, 1970, the Benton Circuit Court entered its Order and Judgment as follows:

'Comes now the plaintiff and files counter-affidavit, which includes a photocopy of the record of Cause No. C53-187 in the Lake Circuit Court, in which said cause a deed was ordered executed to the school city of Crown Point, Indiana, by one John R. Lynch, duly appointed Commissioner of the Lake Circuit Court for the execution of said deed in which affidavit and papers read as follows: to-wit: Here Insert. And come now again the parties, by counsel, and defendant's Motion for Summary Judgment is submitted to the Court for findings and judgment. Argument heard. And now the parties by agreement stipulate that the description of the land contained in plaintiffs' complaint in this cause is correct and is the real estate in question. And now the Court finds and adjudges that said motion for summary judgment should be sustained and the Court specifically finds and adjudges that the title in fee simple to said real estate is in the Crown Point Community School Corporation in Lake County and the Court further finds and adjudges that all matters not pertaining to the title of said

real estate are at issue in this cause upon said complaint and the answers filed thereto.'

(10) That the other issues presented by plaintiffs in their complaint pertaining to the regularity of the sale proceedings have never been adjudicated, and are now moot. That an attempted appeal by plaintiffs from the partial summary judgment referred to above was dismissed by the Supreme Court.

(11) That the sale of May, 1969, or the attempted sale, was subsequently abandoned by the defendant school corporation.

(12) That on or about November 27th and December 4, 1970, the defendants again attempted to conduct a sale of the subject lands in that there appeared in the Lake County Star newspaper, a legal notice, a copy of which is attached to plaintiffs' complaint as Exhibit 'A'. That the auction sale advertised in said notice was scheduled to be held on December 28, 1970 at 7:30 p.m., C.S.T. That prior to said public auction sale, and on December 28, 1970, plaintiffs instituted the instant action, caused notice to be issued and served on the defendant Board and cause lis pendens notice to be filed. That at said time, plaintiffs obtained a restraining order without notice and posted a bond.

(13) That with respect to the second and subsequent sale attempted by defendants in November and December of 1970, they have undertaken to consummate that sale.

MADE and ENTERED this 9 day of May, 1973.

/S/ NEWELL A. LAMB
Hon. Newell A. Lamb
Special Judge."

In summary, the respondents took petitioners' land for school purposes, under a statute which granted respondents power to take the land only for school purposes. Sixteen (16) years later, the land had still not been used for school purposes, but rather, remained vacant and unimproved. Respondents attempted to sell it to private third parties. Petitioners sued claiming that the land reverted to them, and that, in any event, the respondents hadn't followed the necessary procedural steps to sell the land. Respondents moved for summary judgment. The trial court granted the partial summary judgment recited in special finding of fact No. "(9)", supra. The partial summary judgment purported to determine that "fee simple" title had vested in the respondents. (No mention was made as to whether it was absolute, or determinable or conditional.) The trial court did not adjudicate the remaining issues. Petitioners took an interlocutory appeal. The Supreme Court dismissed the appeal on the basis that the partial summary judgment was a "final judgment" requiring a motion to correct errors as a condition precedent to appeal, and not an interlocutory judgment. (See Indiana Supreme Court decision and opinion reported at ___Ind. ___, 269 N.E. 2d 5).

The dissent tells the story as follows:

> "At the time appellants' counsel was required to decide whether to make a motion to correct errors, TR. 59 was only three months old and had not been interpreted by this Court. The rule does not specifically state that a motion to correct errors is a necessary condition precedent to appeal following the entry of a summary judgment. Conflicting appellate court opinions interpreting our former rule governing the motion for new trial existed at the point in time when this lawyer had to act.
>
> Under these circumstances, I would not apply the interpretation given TR. 59 for the first time today, to this case, and would, therefore, vote to deny this motion to dismiss as I did on September 13, 1970, when this Court entered its order dismissing this appeal."

This might well have been the end of the matter, absent resort to this Court. However, the respondents rendered the whole matter moot when, pendente lite, they abandoned the sale. (As found by the trial court in the second action) This rendered moot the case still pending before the first trial court. Then, at a later date, respondents again attempted to sell the land to private third persons, thus, again, indicating their intention not to devote the land to school purposes! (As long as respondents held title, they theoretically could still use the land for school purposes. The

Statute under which they took it imposes no time limit.) It was the sale, which would place the land beyond use for school purposes, of which petitioners complained. In any event, petitioners instituted their second action which resulted in the decision and opinion they ask this Court to review. Petitioners prevailed in the trial court; respondents appealed. The Court of Appeals reversed and denied rehearing; and the Supreme Court denied transfer, without opinion. The opinion of the Court of Appeals acknowledges the existence of two (2) main issues, to-wit:

> "1. Whether a prior judgment of the Benton Circuit Court decreeing that the school corporation had a fee simple title to the land in question, and denying appellees' request for quiet title, was res judicata to this action.
>
> 2. Whether a condemnation proceeding commenced under IC 1971, 20-5-23-1 through 20-5-23-4, Ind. Ann. Stat. Sections 28-4004 - 28-4007 by a school corporation results in said corporation acquiring a fee simple title, or a title that will revert to the initial owner if the land is not used for school purposes within five years."

The Court of Appeals reversed, wholly upon the issue of res judicata, and never reached the main issue of reversion -vs- condemnation of fee simple absolute title.

Thus, by state court judicial fiat, the respondents became vested with a title by condemnation which they could not acquire under the legislation granting the power of

eminent domain. This is in derogation of petitioners' right guaranteed and protected by the United States Constitution.

REASONS FOR GRANTING THE WRIT

1. The Decision and Opinion of The Court Of Appeals, And The Denial Of Transfer By The Supreme Court Of Indiana, Violates Petitioners' Rights Under The Due Process Clause Of The Fourteenth Amendment To The Constitution Of The United States.

It is believed that the precise question here presented is one of first impression in this Court. It is believed, however, that the rights involved are so basic and so fundamental that this Court should adjudicate them, once and forever. The right of private citizens to own, and be secure in their property rights, has been substantially eroded over the years. Condemnation statutes granting the power of eminent domain have been grossly abused. Ever-increasing Public ownership of vast parcels of real estate has been a cause of growing concern. Still, there can be no doubt that circumstances do arise where the general public interest is so overriding in the need for public improvements, that governments must, from time to time, take land away from private parties in order to serve that need.

There are many who believe that a private citizen should not be heard to complain so long as he receives "just compensation". There are even those who stand firm against any private ownership of property. However, in our Country, the right of a private citizen to own, hold, and be secure in his property, has traditionally been carefully guarded. This is particularly true with

respect to real property, as opposed to personalty. It is recognized that there are no two (2) pieces of land exactly alike. Each is, to a lessor or greater degree, unique in its quality and character, not to mention location. Contracts for the sale of real estate are subject to specific enforcement in direct recognition of the traditional view. Whether this regard for one man's right of private ownership of real estate has its roots in the psychological theory of the territorial imperative, or is a matter of legal tradition, is unimportant. Suffice it to say, this Country has reached a critical stage on the subject, and the Court should act.

When you add to this base proposition the evil that can arise from allowing public bodies to take land for a given purpose, and then not use it, but rather sell it to other private citizens, there is presented an even more urgent need for the Court to act.

As things stand now, at least in Indiana, any governmental unit, large or small, elected or appointed, can appropriate land from one person and sell to another at will, and without restraint. There is no check or balance. There is no necessity for the condemning authority to prove the need for the taking. There is no restriction on the merchantability of the title taken arising from the quality of title acquired.

This is a dangerous and unwholesome state of affairs. It is certainly one never intended by the Indiana General Assembly. The Legislature wrote the "Eminent Domain For Schoolhouses Act" in 1907, (cited and set out, supra) and specifically limited the power granted to be used for school

purposes. That statute has never been amended to this very day.

When confronted with similar State condemnation situations, the Courts in the federal system have uniformly held:

> "Where school Trustees took title to school site by eminent domain with owner's consent, the title of the school trustees was the statutory title granted by the Legislature, and where there was no evidence that school trustees procured any other kind of title, or that they ever made any claim to any other kind of title, they could by their acts obtain only such title as was necessary for the conduct of the school."
>
> "Schools and school districts - School trustees derive all their authority from the statute, and can exercise no power not expressed thereby."
>
> "Where school trustees took title to school site by eminent domain only for school purposes, their title was merely the right to use the property for such purposes, and there existed no justification for extension of such title by implication."
>
> "Where school trustees acquired title to school site by eminent domain with owner's consent under statute giving right to use the property for school purposes, no title to

anything other than that necessary to enjoyment of what was contemplated by statute was included, and trustees were without right to lease school site for oil and gas purposes."

"Title to school site for school purposes acquired by school trustees could not be augmented to a fee simple or a determinable fee or to include anything other than use for school purposes by virtue of possession by the school district, which possession was entirely consistent with the use for school purposes only, and the school district could not enlarge the title to an 'easement' it had acquired by eminent domain by the taking or make it over into a title for all purposes by subsequently claiming that it had acquired title by adverse possession."

See: Superior Oil Co. v. Harsh (1941) 39 F. Supp. 467 (Aff'd. 126 F. 2d 572). The Illinois Statute involved (Chap. 122, Cothrans 1881 Ill. Rev. Stats., Sections 39, 41 and 48) is virtually identical to the Indiana "Eminent Domain For Schoolhouses Act" of 1907. The District Court pointed out, at p. 470 of the opinion:

"It is provided in Section 41 of the Act that the School trustees may acquire real estate which 'shall vest in said Board for the use of said township for school purposes'. Provision is made in

Section 48 for location of school-house sites in each district and the act directs that the school authorities 'shall have the right to take the same for the purpose of a school-house site either with or without the owner's consent."

The case of Kelly v. Bowman (1952) U.S.D.C. E.D. Ill., 104 F. Supp. 973, 202 F. 2d 275,* was an action by a private citizen (successor in title to original landowner) against a Board of School trustees, and a current "owner" of the same land, to determine ownership of certain land and buildings. The land had been appropriated from the original owner in 1906. The trustees erected school buildings on the land, which were used for many years. Then, in 1952, the school trustees (following a statutory procedure) sold the land to Bowman. The District Court,* Platt, J., held that the title acquired by the school trustees in the condemnation suit was only a determinable fee, and that when the property was abandoned for school purposes, the title reverted to plaintiffs as successors in interest to the person who owned it at the time of the condemnation suit.

These principles, in some instances, have been derived (at least in part) from noted writers on the subject, and in other instances, have been adopted by them. For example, see:

(a) Vol. 3, Nichols on Eminent

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*The Seventh Cir. Ct. of Appeals adopted District Judge Platt's decision, opinion and reasoning, in toto.

Domain, 3rd Ed., Section 11.209;

(b) Elliot on Roads and Streets, Section 225;

(c) Cooley, Constitutional Limitations, (7th Ed.) p. 808;

(d) Lewis, Eminent Domain, Section 449.

The proposition is dealt with in Vol. 30, C.J.S., Eminent Domain, Section 454, as follows:

"Where land is taken in fee simple absolute, the condemnor may sell it irrespective of the use to which the purchaser may intend to put it; where a fee is acquired subject to a trust to use the property for a particular purpose, the condemnor is not entitled to sell the land, unless by statute authorized to do so."

Then, in ensuing sections, it is stated:

"Section 457: An easement acquired by condemnation proceedings may be lost by nonuser for an unreasonable length of time. Where property is not used because of the impossibility of using it for the purpose for which it was taken, the right to hold it ceases."

"Section 458: * * * Nonuser, if long continued, is evidence of intent to abandon, and

may give rise to a presumption of abandonment. * * *".

"Section 460: Where the condemnation vested a fee, the general rule is that the property does not revert to its former owner when it ceases to be used for the purpose for which it was condemned. Where a base, qualified, or terminable fee was acquired, and the right to use the property has been lost by forfeiture, nonuser, or abandonment, or by the ending of the public use, the title and rights revert to the original owner. * * *".

This Court is not bound by the Indiana Courts decisions under the doctrine of res judicata, or otherwise. In the case of Dalche v. Board of Commissioner's Of Orleans Levee Board (1931) D.C., E.D., Louisiana, New Orleans Div., 49 F. 2d 374, the Court, in reviewing a state eminent domain case, was confronted with the contention that it was bound by the rulings and decision of the State court under the doctrine of res judicata. In rejecting this contention, the District Court, Dawkins, J., held that federal courts are vested with the duty of determining for themselves what is due process under the Fourteenth Amendment, and in so doing, are not bound by the rulings of state courts. (p. 381)

Furthermore, petitioners did raise the issue of their Fourteenth Amendment rights on appeal, both in their answer brief, in the Court of Appeals, and in their brief in support of petition to transfer to the Supreme Court following reversal. The Court of Appeal's opinion fails to reveal this legal

fact, inasmuch as the Court chose to turn their decision on the application of the doctrine of res judicata, and thus never came to grips with the fundamental question of title, which was the issue involving the operation of the Fourteenth Amendment Due Process clause.

CONCLUSION

For These Reasons, Writ(s) of Certiorari should issue to review: The decision and opinion of the Court of Appeals of Indiana, its order denying rehearing, and the order of the Indiana Supreme Court denying Transfer.

Respectfully submitted,

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APPENDIX A.

(Following is the decision and opinion of the Court of Appeals of Indiana, made and filed December 20, 1972)

"SHARP, J.

Defendant-appellant, Crown Point Community School Corporation (School Corporation) appeals from a decision which quieted title to certain real estate in favor of the plaintiffs-appellees (Richards), canceled a commissioner's deed and permanently enjoined the School Corporation from selling the real estate in question to a private third party.

In 1953, the predecessor of the School Corporation brought an action under I.C. 1971, 20-5-23-1 et seq.; Ind. Ann. Stat. Section 28-4004, et seq. (Burns 1970) to acquire by condemnation certain lands of Richards. The proceeding culminated in a commissioner's deed being executed and delivered to the predecessor of the School Corporation and the sum of $8,000.00 being paid to the Richards. No appeal was taken from this initial action.

For sixteen years the land remained unused for school or any related purpose and in 1969 the School Corporation decided to sell the land at public sale. Upon learning of the intended sale, the Richards filed a complaint in the Lake Circuit Court

asserting fee simple title to the land, and asked, among other things, that title be quieted in them. The Richards also asserted procedural defects in the attempted sale which allegedly rendered said attempted sale illegal and void. The case was venued to the Benton Circuit Court, which granted a partial summary judgment in favor of the School Corporation on the issue of title to the land but reserved for trial the other issues relating to the procedures followed for the public sale. The judgment of the Benton Circuit Court reads, in part, as follows:

> 'Comes now the plaintiff and files counteraffidavit, which includes a photocopy of the record of Cause No. C53-187 in the Lake Circuit Court in which said cause a deed was ordered executed to the school city of Crown Point, Indiana, by one John R. Lynch, duly appointed Commissioner of the Lake Circuit Court for the execution of said deed in which affidavit and papers read as follows: to wit: (Here Insert) And come now again the parties by counsel, and defendant's Motion For Summary Judgment is submitted to the Court for findings and judgment. Argument heard.

> And now the parties by agreement stipulate that the description of the land contained in plaintiffs' complaint in this cause is correct and is the real estate in question. And now the Court finds and adjudges that said motion for summary judgment should be sustained and the Court specifically finds and adjudges that the title in fee simple to said real estate is in the Crown Point Community School Corporation in Lake County and the Court further finds and adjudges that all matters not pertaining to the title of said real estate are at issue in this cause upon said complaint and the answers filed thereto.'

The School Corporation thereafter elected to abandon the sale. The Richards, however, attempted to appeal the partial summary judgment as an interlocutory order, but the appeal was dismissed without opinion. In ruling on the petition for Rehearing, our Supreme Court, in Richards v. Crown Point Community School Corp., ___ Ind. ____, 269 N.E. 2d 5 (1971), wrote a per curiam opinion to clarify their position and stated:

'For all the foregoing reasons the Court hereby finds that, the order and judgment as to the fee simple title in question having been a final order, the proper route of appeal lay in the filing of a motion to correct errors and a review before the Appellate Court. TR. 59(G).

The motion previously granted to dismiss the direct appeal to this court is therefore re-affirmed.'

In 1970, the School Corporation again sought to sell the land by public sale to a private third party. The Richards filed a complaint which was identical to the one filed in the earlier action and which contended that they were the owners in fee simple of the land in question and asked for the same relief. Thereafter the School Corporation filed a Motion to Dismiss with exhibits attached showing the previous complaint filed, Motion for Summary Judgment filed, and a copy of the judgment of the Benton Circuit Court. No counter-affidavits were filed and the facts were not in dispute. The trial court overruled the Motion to Dismiss and thereafter the evidence was stipulated. On May 9, 1972, the trial court entered judgment quieting title in favor of the Richards. The School

Corporation's Motion to Correct Errors was overruled and this appeal perfected.

The two primary issues presented here for review are as follows:

1. Whether a prior judgment of the Benton Circuit Court decreeing that the school corporation had a fee simple title to the land in question, and denying appellees' request for quiet title, was res judicata to this action.

2. Whether a condemnation proceeding commenced under IC 1971, 20-5-23-1 through 20-5-23-4, Ind. Ann. Stat. Sections 28-4004 - 28-4007 by a school corporation results in said corporation acquiring a fee simple title, or a title that will revert to the initial owner if the land is not used for school purposes within five years.

Regardless of the correctness of the judgment of the Benton Circuit Court which quieted title to said real estate in the School Corporation, we must first determine whether said judgment conclusively decided the question of title as between the two parties and is, therefore, res judicata as to this action.

The requisite elements necessary for the application of the

doctrine are enumerated in Wright v. Kinnard, ___ Ind. App. ____, 262 N.E. 2d 196 (1970), where this court stated:

> 'The basic elements of res adjudicata are fourfold: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the matter now in issue was, or might have been, determined in the former suit; (3) the particular controversy adjudicated in the former action must have been between the parties to the present suit; and (4) judgment in the former suit must have been rendered on the merits.'

See also Amann v. Tankersley, ___ Ind. App. ___, 273 N.E. 2d 772 (1971); Johnson v. Knudson Mercer Company, 167 Ind. 429, 79 N.E. 367 (1906).

There is no question but that the former judgment was rendered by a court of competent jurisdiction and that the parties are the same as in the prior suit. Although the Richards question whether summary judgment was a decision on the merits, the major thrust of their argument centers on whether the former judgment conclusively determined all questions relating to the title to the real estate. It is in regard to this element that the Richards advance several arguments, cumulative in nature, as to why

the former judgment is not a bar to this present action.

The Richards first argue that the Benton Circuit Court judgment never did grant or deny their claim. The judgment simply found the fee simple title to said real estate was in the School Corporation, without deciding what interest, if any, the Richards had in the property.

Secondly, the Richards contend that since the School Corporation abandoned the sale of 1969, which precipitated the initial law suit, the issues reserved for trial were rendered moot. They claim that the issue of forfeiture was never raised or decided by the Benton Circuit Court because the Richards complaint, although seeking to quiet title, did not attack the retention of title by the School Corporation, but rather, the attempted sale. As to the first issue, the School Corporation was not required to file an answer or counterclaim before filing a motion for summary judgment, but may file said motion at any time. Trial Rule 56 B; Crowe v. Ben Dee, Inc., ___ Ind. App. ___, 271 N.E. 2d 509 (1971). The issue of the Richards claim to the fee simple title to the real estate was raised by their complaint. In regard to the issue of title, the School Corporation filed a Motion for Summary Judgment which asserted

that said corporation had title to the real estate by virtue of a Commissioner's Deed. The Benton Circuit Court's order decided two things. By its granting of partial summary judgment, the court decided against the Richards' claim to the fee simple title. The Court then proceeded further, since there was no issues as to any material facts, and specifically decided that the School Corporation had the fee simple title to the real estate. Regardless of the propriety of the latter action, the fact remains that the granting of the Motion for Summary Judgment was a denial of the Richards' claim to the fee simple title as alleged in their complaint.

The Richards were dissatisfied with the scope and nature of the Benton Circuit Court decision and they appealed therefrom. In Board of Commissioners of Adams County v. State, ex rel. Gibson, 226 Ind. 633, 637, 82 N.E. 2d 891 (1948), our Supreme Court said:

'If jurisdiction was lacking there would be no valid judgment, but if the court erroneously entered a judgment which was not supported by the law, something that was contrary to the 'rights' of the appellees, then the only method of correcting that error would be by an appeal and reversal.'

The appeal was dismissed by our Supreme Court for procedural reasons which put said judgment beyond attack. Thus, the Benton Circuit Court judgment denying the Richards' claim to the fee simple title stands as a final judgment and is res judicata to this action unless there remain issues which were not and which could not have been raised and determined in said action. This brings us to the Richards' argument that the issue of forfeiture was not raised or decided in the Benton Circuit Court. An examination of the complaint in that action in the Benton Circuit Court is illuminating and, in part, reads as follows:

> '(i) That under the law of the State of Indiana, where the defendants . . . purport to appropriate land under the Indiana law (which is the only authority for doing so), said appropriation of plaintiffs land can only be 'for school purposes' under the statute; and in the event it is not used or devoted to school purposes, then it reverts to plaintiffs, the landowners. Such land cannot be sold to others by the School Corporation or Board and it cannot otherwise be used than for school purposes.'

The above language is identical to that used in the complaint

filed in this present cause of action. The clear intent of the above paragraph would seem to be to raise the issue of forfeiture and reverter, which could be the only way the Richards could have any claim to the fee simple title to the real estate. The Richards' attempt to circumvent the apparent thrust of said language by arguing that even though the real estate was forfeited by the School Corporation for non-use in 1958, the Richards would only assert their reacquired title if the School Corporation attempted to sell the property, and that since the School Corporation abandoned the initial sale, the motivation for asserting their reacquired title no longer existed. This argument presupposes that this court may take cognizance of the alleged motivation of the Richards in seeking to quiet title in the Benton Circuit Court.

It is axiomatic that, regardless of the motivation, the Richards raised the issue of their claim to the fee simple ownership of the land by their own complaint in the Benton Circuit Court. The claim to said ownership was based upon the precise same theory advanced in this action, i.e., that the appropriation of their property could only be for 'school purposes' and that in the event that it was not so used, it

reverted to the Richards. Having raised the issue in the Benton Circuit Court, the Richards cannot now contend that it was raised only for the limited purpose of stopping the sale of the land. The question of title to the real estate was separate and distinct from any procedural defects in the attempted sale by the School Corporation.

Even assuming that the Richards had only the limited purpose in mind, it is of no avail since the doctrine of res judicata applies not only to issues that are actually raised, but also to any issues that might have been raised. In Hammond Pure Ice & Coal Co. v. Heitman, 221 Ind. 352, 358, 47 N.E. 2d 309 (1942), our Supreme Court stated:

> 'It has many times been held by this court that the doctrine of res adjudicata embraces not only what was actually determined, but every matter which the parties could have litigated in the cause. The judgment in the former case is conclusive and bars a subsequent action if an opportunity was presented to litigate the entire subject matter in the first action.'

Once the Richards decided to contest the initial attempted

sale of the property and raised the issue of their alleged title, they were bound by the decision as to all issues which they might have raised. By their initial complaint, the Richards had an opportunity to avail themselves of the issue of forfeiture. Whatever the motivation for not doing so, it is now beyond the pale and cognizance of this court.

Finally, the Richards argue that under the Benton Circuit Court judgment the School Corporation could only have obtained what they received in the initial condemnation case, which was a title subject to forfeiture. The Richards are thus attempting to question the scope and nature of the fee simple title quieted in the School Corporation by the Benton Circuit Court. However, said judgment not only quieted title to the real estate in the School Corportion, but also granted summary judgment in favor of the School Corporation in regard to the Richards' claim to the fee simple title. Thus, we need not reach and decide the second issue concerning the exact nature of the School Corporation's title as the Richards are precluded from attacking said title. The Benton Circuit Court judgment quieting the fee simple title to the real estate stands as a final judgment which conclusively determined the respective rights of the parties in and

to the subject real estate.

We hold that the Benton Circuit Court judgment is res judicata as to any claim by the Richards to the fee simple title to the real estate. The judgment of the trial court is therefore reversed with instructions to enter judgment for the appellant School Corporation.

Hoffman, C.J. and Staton, J. concur."

APPENDIX B.

(Following is the order of the Court of Appeals of Indiana, denying rehearing, made and entered February 7, 1973)

"No. 3-972A58

Crown Point Comm. School, et al V. Nicholas R. Richards, et al

You are hereby notified that the Court of Appeals has on this day - Appellee petition for rehearing DENIED. Hoffman, Jr.,C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

Witness my name and the seal of said Court, this 7th day of February, 1973.

/S/ Billie R. McCullough
Clerk Supreme Court and
Court of Appeals".

APPENDIX C.

(Following is the order of the Supreme Court of Indiana, denying Transfer, made and entered February 3, 1973)

"No. 3-972A58

Crown Point Comm. School Corp., et al
V. Nicholas R. Richards, et al

You are hereby notified that the Indiana Supreme Court has on this day - Appellees' 'Petition To Transfer' is hereby Denied this 3rd. day of July, 1973.
Arterburn, C.J.
J. DeBruler, Dissents.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 3rd day of July, 1973.

/S/ Billie R. McCullough
Clerk Supreme Court and
Court of Appeals".

APPENDIX D.

(Following are the Special Findings of Fact, Conclusions of Law (thereon), and Judgment and Decree, made and entered by the trial court on May 9, 1972. The judgment was in favor of petitioners, as plaintiffs. It is this judgment which the Court of Appeals reversed on December 20, 1972.)

"STATE OF INDIANA)
) SS: In The Lake Superior Court, Room No. One
COUNTY OF LAKE)

Nicholas R. Richards and Agnes B. Richards, Husband and Wife,

Plaintiffs,

-vs-

Crown Point Community School Corporation, Harold L. Wheeler, William R. Barnett, Glenn R. Cooper, Glenn O. Bothwell, and Charles I. Aylesworth, Members of and Constituting The Board of School Trustees Of The Crown Point Community School Corporation,

Defendants.

Cause No. 170-845

"FINDINGS OF FACT

(1) On and before March 6, 1953, plaintiffs were owners of fee simple absolute title to the real estate described in Rhetorical Paragraph 1 of plaintiffs' complaint, to-wit:

Part of the East Half of the Southwest quarter of Section 5, Township 34 North, Range 8 West of the 2nd P.M., described as commencing at a point 890.7 feet West of the Northeast corner of a track of land conveyed to Patrick Maguire by Warranty Deed dated March 8, 1871 and recorded March 9, 1871, in Deed Record 13, page 503, running thence South 499.71 feet along the West line of the Maguire track and along the West line of the tract conveyed to Hazel Wilds by Warranty Deed dated May 26, 1939, and recorded May 26, 1939, in Deed Record 595, page 339, to the Northwest corner of the tract of land conveyed to John Kinney by Warranty Deed dated February 20, 1873 and recorded September 11, 1879, in Deed Record 27, page 350, thence West 400 feet, thence North 502.15 feet, to the North line of said East half of the Southwest quarter, thence East along said North line 400 feet to the place of beginning, containing 4.60 acres, more or less, in the City of Crown Point, Lake County, Indiana.

(2) That defendants constitute the Crown Point Community School Corporation, which is a community school corporation organized and existing under the laws of the State of Indiana and charged with the ownership, management and control of the common public schools, lands, property and education system in the city of Crown Point, Indiana. Said defendant is the successor in interest to the School City of Crown Point which was in existence in March of 1953.

(3) That on or about March 5, 1953, the defendant's predecessor commenced an action in the Lake Circuit Court as Cause No. C53-187, entitled: 'In The Matter Of The Board of School Trustees Of The City of Crown Point for Appointment of Appraisers to Appraise Land Owned By Nicholas R. Richards and Agnes B. Richards, Husband and Wife.' That said petition alleged, in substance, that the Board of School Trustees had found it urgently necessary to acquire the aforedescribed plaintiffs' lands for building accommodations for the School City of Crown Point in order that ample room could be had to house education classes for lower grades and accommodate pupils in the immediate future.

(4) Soon after the commencement of said action in the Lake Circuit Court, appraisers were appointed and the Court found for the petitioners. The appraisers filed their report of appraisal in the sum of $8,000.00, which money was deposited with the Clerk and an appointed commissioner conveyed the land to the school city of Crown Point by Commissioner's Deed, all of which occurred by September 11, 1953.

(5) That said proceedings in the Lake Circuit Court were taken and had pursuant to the 'Eminent Domain For School House Act' of 1907, (Burns' Section 28-2501 and 2504)* as opposed to the 'Eminent Domain Act of 1905' (Burns' Section 3-1707 to 1712).

(6) That for a period of 16 years, from 1953 to 1969, the subject land remained vacant and was not devoted to school purposes for which it was acquired, for the building of accommodations for the school city of Crown Point in order that ample room be had to house education classes for lower grades and accommodate pupils.

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*This Act was recodified as Burns' Ind. Stat. Anno. Sections 28-4004 to 4008

(7) That sometime in the Spring of 1969, the defendant determined to sell the subject lands, at public sale, and cause a notice of such purported sale to be published in the 'Lake County Star', on May 2, 1969.

(8) That prior to the receipt of bids in response to said notice, plaintiffs filed written notice with the defendant board, asserting their claim and caused to be instituted an action in the Lake Superior Court, Room No. One, Cause No. 169-603, entitled: Nicholas R. Richards and Agnes B. Richards, Husband and Wife, plaintiffs -vs- Crown Point Community School Corporation, et al, defendants, wherein they asserted their aforementioned claims and contentions.

(9) The cause was subsequently venued to the Benton Circuit Court, docketed there as Cause No. C69-192. Thereafter, defendants filed a motion for summary judgment. On April 13, 1970, the Benton Circuit Court entered its Order and Judgment as follows:

> 'Comes now the plaintiff and files counter-affidavit, which includes a photocopy of the record of Cause No. C53-187 in the Lake Circuit Court, in which said cause

a deed was ordered executed to the school city of Crown Point, Indiana, by one John R. Lynch, duly appointed Commissioner of the Lake Circuit Court for the execution of said deed in which affidavit and papers read as follows: to-wit: Here Insert. And come now again the parties, by counsel, and defendant's Motion for Summary Judgment is submitted to the Court for findings and judgment. Argument heard. And now the parties by agreement stipulate that the description of the land contained in plaintiffs' complaint in this cause is correct and is the real estate in question. And now the Court finds and adjudges that said motion for summary judgment should be sustained and the Court specifically finds and adjudges that the title in fee simple to said real estate is in the Crown Point Community School Corporation in Lake County and the Court further finds and adjudges that all matters not pertaining to the title of said real estate are at issue in this cause upon said complaint and the answers filed thereto.'

(10) That the other issues presented by plaintiffs in their complaint pertaining to the regularity of the sale proceedings have never been adjudicated, and are now moot. That an attempted appeal by plaintiffs from the partial summary judgment referred to above was dismissed by the Supreme Court.

(11) That the sale of May, 1969, or the attempted sale, was subsequently abandoned by the defendant school corporation.

(12) That on or about November 27th and December 4, 1970, the defendants again attempted to conduct a sale of the subject lands in that there appeared in the Lake County Star newspaper, a legal notice, a copy of which is attached to plaintiffs' complaint as Exhibit 'A'. That the auction sale advertised in said notice was scheduled to be held on December 28, 1970 at 7:30 p.m., C.S.T. That prior to said public auction sale, and on December 28, 1970, plaintiffs instituted the instant action, caused notice to be issued and served on the defendant Board and cause lis pendens notice to be filed. That at said time, plaintiffs obtained a restraining order without notice and posted a bond.

(13) That with respect to the second and subsequent sale attempted by defendants in November and December of 1970, they have undertaken to consummate that sale.

MADE and ENTERED this 9 day of May, 1973.

/S/ NEWELL A. LAMB
Hon. Newell A. Lamb
Special Judge."

"Conclusions Of Law

"(1) The law is with the plaintiffs and against the defendants.

(2) That the proceedings held and had in 1953 in the Lake Circuit Court, Cause No. C53-187 were proceedings under the 'Eminent Domain For School Houses Act of 1907' (Indiana Acts, 1907, Ch. 87, Sections 1 - 4, former Burns Indiana Statutes Annotated Sections 28-2501 - 2504), and were not proceedings under the general 'Eminent Domain Act of 1905' (Indiana Acts, 1905, Ch. 48, Section 1 - 12, being Burns' Sections 3-1701 - 1712).

(3) That the statutes mentioned in Paragraph 2 of these conclusions have been held to be 'in pari materia', not in conflict and that they must be construed together. This court, therefore concludes:

A. that the proceedings in Cause No. C53-187 in the Lake Circuit Court entitled, 'In The Matter of the Petition of the Board of School Trustees of the City of Crown Point for appointment of Appraisers to Appraise Land Owned by Nicholas R. Richards and Agnes B. Richards, Husband and Wife', by which the defendant herein, the Crown Point Community School Corporation, et al, obtained a commissioner's deed to the lands in question

were regular, and the School City acquired a title under the statutes by condemnation.

B. that the petition by which such deed was obtained in the said condemnation suit states 'that said Board of School Trustees deem it advisable and necessary to purchase and acquire the real estate hereinabove described as a part of a site for the proposed building of a grade school building to accommodate grade school pupils in the northwest portion of the City of Crown Point as said City now exists and to care for immediate future development, it being urgently necessary to provide said building accommodations for the School City of Crown Point, Indiana xxxx'. Said School Corporation having obtained its title by condemnation and not by purchase the Court further finds that the statute in such cases made and provided plainly that if 'the person, corporation or other body seeking such appropriation x x x shall fail to take possession of such land and adapt it to the use for which it was appropriated within five (5) years after the payment of the award or judgment for damages except where a fee simple is authorized to be condemned and appropriated and is condemned and appropriated such person, corporation or other body seeking such appropriation, in either of such cases, shall forfeit all rights in and to such real estate or

other property as fully and completely as though no such appropriation or condemnation had been begun or made.'

C. The statute authorized an action to be brought to determine the question of forfeiture.

D. That the question of the forfeiture has never been determined.

This Court further concludes, therefor, that inasmuch as the land was not used for school purposes withinn the statutory time of five years, the title thereto was then forfeited by the condemnors. Therefore, the condemnees at this time have a right to quiet title to the land both under the case law of this state, and that to hold otherwise would deprive the plaintiffs herein of their property without 'due process of law'.

(4) Defendants failure, over a period of 17 years, to devote the real estate and estate taken to the use for which it was taken, i.e., to build a school house, coupled with defendants' purported sale and resale of the subject land to a private third party, caused the estate taken to be determined and the property to revert to plaintiffs and title thereto to be reinvested in plaintiffs.

(5) That the partial summary judgment rendered and entered in the Benton Circuit Court, Cause No. C69-192, (formerly Lake Superior Court, Room No. One, Cause No. 169-603) does not constitute a bar to the instant action under the doctrine of res judicata for the reasons that said judgment did not state the full nature of the quality of title condemned, or the forfeiture, and the proposed sale there in issue was subsequently abandoned, thereby rendering the cause moot.

(6) That plaintiffs are the sole owners of the subject real estate and fee simple absolute title thereto. That the claim of defendants, their successors, assigns and grantees, if any, in and to said real estate and/or title thereto is without right and unfounded. That plaintiffs title to said real estate should be quieted.

(7) That plaintiffs are entitled to immediate possession of the subject real estate.

(8) That the Commissioner's Deed executed and delivered in connection with the original Lake Circuit Court proceedings in Cause No. C53-187 should be vacated, set aside, cancelled and held for naught.

(9) That any sale, conveyance or attempted or purported sale or conveyance of the subject

lands by and between defendants and others, if any, should be enjoined, set aside, vacated and held for naught.

MADE and ENTERED this 9 day of May, 1972.

/S/ NEWELL A. LAMB
Hon. Newell A. Lamb
Special Judge."

"JUDGMENT AND DECREE

This cause having been submitted to the Court, without the intervention of a jury, for finding, decision and judgment as an agreed case pursuant to pre-trial order approved by the parties, included agreed statements of facts and documentary exhibits, and the Court having taken the matter under advisement, having examined the agreed facts and documentary exhibits, and having made and entered its Findings of Fact and Conclusions of Law thereon, now orders, adjudges and decrees as follows:

(1) That plaintiffs do have and recover judgment of and from defendants;

(2) That plaintiffs Nicholas R. Richards and Agnes B. Richards, husband and wife, as tenants by the entireties, are the sole owners of the following described real estate and fee simple absolute title thereto;

Part of the East Half of the Southwest quarter of Section 5, Township 34 North, Range 8 West of the 2nd P.M., described as Commencing at a point 890.7 feet West of the Northeast corner of a tract of land conveyed to Patrick Maguire by Warranty Deed dated March 8, 1871 and recorded March 9,

1871, in Deed Record 13, page 503, running thence South 499.71 feet along the West line of the Maguire tract and along the West line of the tract conveyed to Hazel Wilds by Warranty Deed dated May 26, 1939, and recorded May 26, 1939, in Deed Record 595, page 339, to the Northwest corner of the tract of land conveyed to John Kinney by Warranty Deed dated February 20, 1873 and recorded September 11, 1879, in Deed Record 27, page 350, thence West 400 feet, thence North 502.15 feet, to the North line of said East half of the southwest quarter, thence East along said North line 400 feet to the place of beginning, containing 4.60 acres, more or less, in the City of Crown Point, Lake County, Indiana.

That the claim or claims of defendants, their successors, assigns or grantees, if any, in and to said real estate or title thereto, are without right and unfounded and plaintiff's title to said real estate is hereby, in all things, quieted.

(3) That the Commissioner's Deed made, executed and delivered by one John R. Lynch, as court appointed commissioner, to the School City of Crown Point, Indiana, purporting to convey the subject real estate and title thereto, in connection with Lake

Circuit Court, Cause No. C53-187, be, and the same hereby is, in all things, vacated, cancelled set aside and held for naught;

(4) That defendants, their successors, assigns and grantees, if any, be, and they hereby are, ordered to immediately deliver up possession of the subject real estate to plaintiffs;

(5) That defendants be and they hereby are permanently enjoined from selling, transferring or conveying any interest in the subject real estate, or purporting or attempting or agreeing to do so. That any sale, transfer, or conveyance or agreement therefore, if any, between defendants and any third person or persons is hereby cancelled, vacated, set aside and held for naught.

Costs v. Defendants.

MADE and RENDERED this 9 day of May, 1972."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-580

NICHOLAS R. RICHARDS and AGNES B. RICHARDS,
Husband and Wife,

Petitioners,

vs.

CROWN POINT COMMUNITY SCHOOL CORPORATION, HAROLD L. WHEELER, WILLIAM R. BARNETT, GLENN R. COOPER, GLENN O. BOTHWELL, and CHARLES I. AYLESWORTH, Members of and Constituting the Board of School Trustees of the Crown Point Community School Corporation,

Respondents.

RESPONDANT'S BRIEF IN ANSWER TO THE PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN ANSWER TO THE PETITION FOR WRIT OF CERTIORARI

It is the aim of this brief to point out with a minimum of language, the total lack of merit to the Petition For Writ of Error.

Appendix A to the Petition beginning at page 26 sets forth verbatim the opinion from which the Petitioners seek relief. We will quote from the opinion the parts thereof, that negate any possible jurisdictional question of this court.

Beginning at page 30 of the printed Petition (and on page 451of 290 N.E. 2d) Judge Sharp of the Indiana Court of Appeals stated:

> "The two primary issues presented here for review are as follows:
>
> 1. Whether a prior judgment of the Benton Circuit Court decreeing that the school corporation had a fee simple title to the land in question, and denying appellees' request for quiet title, was res judicata to this action.
>
> 2. Whether a condemnation proceeding commenced under IC 1971, 20-5-23-1 through 20-5-23-4, Ind. Ann. Stat. Sections 28-4004 - 28-4007 by a school corporation results in said corporation acquiring a fee simple title, or a title that will revert to the initial owner of the land if not used for school purposes within five years.

Regardless of the correctness of the judgment of the Benton Circuit Court which quieted title to said real estate in the School Corporation, we must first determine whether said judgment conclusively decided the question of title as between the two parties and is, therefore, res judicata as to this action.

On page 37 of the Petition (page 453 of N.E. 2nd last paragraph) the court concludes as follows:

"Finally, the Richards argue that under the Benton Circuit Court judgment the School Corporation could only have obtained what they received in the initial condemnation case, which was a title subject to forfeiture. The Richards are thus attempting to question the scope and nature of the fee simple title quieted in the School Corporation by the Benton Circuit Court. However, the said judgment not only quieted title to the real estate in the School Corporation, but also granted summary judgment in favor of the School Corporation in regard to the Richards' claim to the fee simple title. Thus, we need not reach and decide the second issue concerning the exact nature of the School Corporation's title as the Richards are precluded from attacking said title.

"The Benton Circuit Court judgment quieting the fee simple title to the real estate stands as a final judgment which conclusively determined the respective rights of the parties in and to the subject real estate.

"We hold that the Benton Circuit Court judgment is res judicata as to any claim by the Richards to the fee simple title to the real estate. The judgment of the trial court is therefore reversed with instructions to enter judgment for the appellant School Corporation."

Where, then is the question that would invoke the jurisdiction of this court? The only question decided by the Indiana Court of Appeals was as stated in the opinion, i.e. whether a previous decree in a previous effort by Petitioners to quiet title, was res judicata.

The Petitioners claim the jurisdiction of this Court is invoked under 28 USC Sec. 1257 as follows:

"Final judgments or decrees rendered by the highest Court of a state in which decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari..... where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution.....or where any title, right, privilege or immunity is specially set up or claimed under the Constitution..."

Nowhere in the Petition is it shown the manner in which the federal question, sought to be reviewed was raised. It is not made to appear by any pleading, by request to charge and exception or by an assignment of error that a federal

question was sought to be reviewed in the appellate courts of Indiana.

If Petitioner had any federal question to present it should have been preserved in the first action to quiet title referred to in the opinion of the Court of Appeals.

However, Petitioner's counsel's failure to preserve any question for appeal in that case made the decision of the Circuit Court of Benton County final.

All as stated in the opinion above referred to.

The Petitioner having failed to preserve any question for appeal in the first case, then sought to try again by filing another quiet title suit. The Indiana Court of Appeals held that the first suit and judgment entered by the Benton Circuit Court was res judicata of the question of title.

Respondents respectfully pray that the Petition For Writ of Error be denied.

Respectfully Submitted,

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